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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1976

No. 76-181

A. E. BIDERMAN, RICHARD YAGLE, PRIORITY INVESTMENTS, INC., a Washington Corporation; CAPITAL LAND INVESTMENTS, INC., a Washington Corporation; PEERLESS RESEARCH, INC., a Washington Corporation; PRIORITY INVESTMENTS, INC., a California Corporation, *Petitioners,*

vs.

JAMES T. LYNN, Secretary of the Department of Housing and Urban Development, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

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JAMES T. LYNN, Secretary of the Department of Housing and Urban Development, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

Petitioners pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on May 24, 1976, affirming an order of the district court enforcing two administrative subpoenas duces tecum and neglecting to rule on petitioners' appeal from an order

dismissing their counterclaim for declaratory and injunctive relief, and the order of the Court of Appeals denying a petition for rehearing and rejecting the suggestion for a rehearing in banc entered on July 8, 1976.[1]

OPINIONS BELOW

The district court did not make findings of fact and conclusions of law. Its Order Enforcing Subpoena is unpublished and is reproduced in the Appendix at page 19a. The district court's Order dismissing the counterclaim of petitioners is also unreported and is printed in the Appendix at p. 15a.

The opinion of the Court of Appeals is not yet reported. It is printed in the Appendix at p. 1a. The Order Denying Petitioners' Petition for Rehearing and Suggestion for a Rehearing in Banc is printed in the Appendix at p. 14a.

JURISDICTION

The judgment of the Court of Appeals was entered on May 24, 1976. Petitioners' timely Petition for Rehearing was denied by an order entered July 8, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

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[1]Respondent Secretary also filed a timely Petition for Rehearing with the Court of Appeals. The Court took no action on the Secretary's Petition.

QUESTIONS PRESENTED FOR REVIEW

1. Where a person protests the lawfulness of a government agency's subpoena duces tecum, and has presented evidence which directly contradicts the allegations of the petition for enforcement and the administrator's affidavit in support thereof, is he entitled to either an evidentiary hearing or discovery in order to establish his defense to the petition?

2. May a district court deny an evidentiary hearing and enter an order enforcing an administrative subpoena duces tecum without making findings of fact and conclusions of law?

3. May parties served with administrative subpoenas duces tecum file a counterclaim for declaratory relief to resolve a longstanding dispute with the agency concerning whether or not the activities of the subpoenaed parties are subject to regulation by the act?

4. May the Court of Appeals assume a proper purpose for issuing an administrative subpoena duces tecum on a disputed record of pleadings and affidavits in absence of an evidentiary hearing and findings by the district court?

STATUTE INVOLVED

The statute involved here is the Interstate Land Sales Full Disclosure Act. 15 U.S.C. §1701 et seq., hereafter "the Act." The full text of the Act is set out in the Appendix at p. 25a.

STATEMENT

This case arose out of a petition by the Secretary of the Department of Housing and Urban Development (hereafter "Secretary" or "respondent") for enforcement of two administrative subpoenas duces tecum issued under the Act. 15 U.S.C. §1714(c). R. 1.[2] Petitioners, who had been engaged in the sale of land, were served with the subpoenas and complied in all respects except for the names and addresses of their customers ("customer lists") R. 25; 39; 88-90; 94-96; 101-03. Respondent also filed the Affidavit of John R. McDowell, Deputy Administrator of the Office of Interstate Land Sales Registration ("OILSR"), a division of HUD, and the district court issued an order to show cause. R. 7; 52.

Petitioners filed their answer to the petition for enforcement and four affidavits in opposition to the order to show cause. The affidavits set forth letters to and from OILSR establishing that the only intent of OILSR in seeking petitioners' customer lists was to send letters to petitioners' customers providing erroneous legal advice concerning the customers' purported rights under the Act. They also filed a counterclaim for declaratory and injunctive relief to determine if petitioners were subject to the Act. R. 59; 76; 87; 93; 99; 66. Without providing the requested adversary hearing or an opportunity for discovery to petitioners to enable them to cross-examine the deputy administrator who executed the affidavit causing the issuance of the order to show cause, the

[2]"R." will be the abbreviation used in this Petition for references to the Clerk's Record in the Court of Appeals.

two officials issuing the subpoenas, or two other OILSR officials who later filed affidavits in reply to the affidavits of petitioners, the district court made orders enforcing the administrative subpoenas and dismissing the counterclaim. App. pp. 15a, 19a.

The statute involved in this case has never been the subject of any prior review by this Court. In general, the Act makes it unlawful for a "developer" to make use of any means or instruments of transportation or communication in interstate commerce, or of the mails, to sell or lease any lot in any subdivision unless a statement of record is filed with the Secretary and a printed property report is furnished to the purchaser in advance of the signing of any contract or agreement for sale or lease by the purchaser. It is also unlawful for a developer to practice fraud or deceit upon a purchaser. 15 U.S.C. §1703(a). If a property report has not been given to the purchaser in advance of the time he signs an agreement to purchase property, the agreement is voidable at the option of the purchaser. 15 U.S.C. §1703 (b). A purchaser may also sue for money damages by reason of any untrue statement of a material fact or omission in the statement of record. 15 U.S.C. §1709.

The Secretary is authorized to bring an action to enjoin acts or practices which violate the Act. 15 U.S.C. §1714(a). In addition, the Secretary may make investigations as he deems necessary to determine whether any person has violated or is about to violate any provision of the Act. 15 U.S.C. §1714(b).

The Act contains a statute of limitations of one year after the discovery of an untrue statement or omission

in the property report or misrepresentations or after discovery should have been made by the exercise of reasonable diligence, or within two years after the failure of the developer to file a statement of record and furnish a property report. However, "[I]n no event shall any action be brought by a purchaser more than three years after the sale or lease of the property to him." 15 U.S.C. §1711.

Issuance of the subpoenas.

The first contact between OILSR and petitioners occurred on December 11, 1970, when OILSR wrote to petitioner Priority Investments, Inc., a Washington corporation ("Priority of Washington") suggesting that a statement of record be filed.[3] After an exchange of correspondence between OILSR and Priority of Washington's attorneys (who denied applicability of the Act), the Secretary made a determination on December 7, 1972 that petitioners' land sales business was within the purview of the Act and that any sale of land would be in violation of the Act.[4]

---

[3]"Information furnished this office indicates that your lot sales program may be covered by the Interstate Land Sales Full Disclosure Act which became effective on April 28, 1969.

* * *

"It is to your interest to prepare and file, in duplicate, with this office a 'statement of record' with supporting documents if your lot sale program is within the purview of the Act. It is important that the filing be prepared in accordance with the instructions and format outlined in the Regulations and be on file and in effect prior to engaging the sale of land covered by this Act." R. 111.

[4]". . . You are informed that it is the view of this Office after reviewing the content of the above mentioned complaints and other information we have obtained, that the sale of land by Priority Investments, Inc., is covered by the term subdivision as defined by the Interstate Land Sales Full Disclosure Act." R. 114; 115.

Thereafter, an administrative subpoena duces tecum was issued on January 22, 1973, requiring the production of certain records of petitioners Priority of Washington, Capital Land Investments, Inc., and Peerless Research, Inc. R. 24. The petitioners essentially provided all data about their sales and advertising activities requested in the subpoena except for the customer lists. R. 25; 116.

A personal meeting between petitioners' attorney and various officials of the OILSR took place in Washington, D.C. on March 1, 1973. At that meeting, OILSR informally requested similar data from petitioner Priority Investments, Inc., a California corporation. R. 26. This petitioner also declined to provide the names and addresses of its customers although it did provide the other requested material. R. 28. By letter of April 26, 1973, OILSR notified petitioiners' attorney as follows:

> "After having reviewed the information and material you furnished this Office, on behalf of the subject companies, we have made the following determination: The sale of land by Priority Investments, Inc., (Washington); Priority Investments, Inc., (California); Peerless Research, Inc.; and Capital Land Investments, Inc. does come within the jurisdiction of the Interstate Land Sales Full Disclosure Act.
>
> * * *
>
> "In view of the above, your clients must file a Statement of Record pursuant to 14 U.S.C. §1706 [the reference should be *15* U.S.C.], for the land they are offering for sale.

"In addition, we request that your client[s] furnish us with a list of purchasers requested in the subpoena duces tecum (APD No. 74-73) served on February 5, 1973." R. 30.

On June 8, 1973, petitioners' attorney advised OILSR that petitioners disputed this determination. R. 32. Thereafter, a second subpoena duces tecum was purportedly issued on July 12, 1973, requesting data from petitioner Priority of California. R. 36. Service of this latter subpoena was accepted by petitioners' attorney and that petitioner again refused to surrender its customer lists. R. 38; 39.

The statute of limitations and controversy over respondent's purpose in issuing the subpoenas.

The statute of limitations is of major significance to the present case. The Act provides that actions to void contracts for the purchase of property entered into in violation of the registration requirements of the Act must be commenced within two years after the violation upon which it is based. 15 U.S.C. §1711. See *Hall v. Bryce's Mountain Resort,* 379 F.Supp. 165 (W.D. Va. 1974); *Melborn v. Amrep,* 373 F.Supp. 1378 (M.D. Pa. 1974). Petitioners filed affidavits stating that the last sale of real property by Peerless Research, Inc. was on January 19, 1973 (R. 87), the last sale by Priority Investments, Inc. of California was on April 13, 1971 (R. 93) and the last sale by Priority Investments, Inc. of Washington was on June 29, 1971 (R. 99). Capital Land Investments, Inc. has never sold any land to members of the public and all sales by that petitioner were to the other corporate petitioners. The last such sale was on February 15, 1972 (R. 73).

Petitioners alleged in their answer to the petition (R. 61-62) and in the affidavit of their attorney (R. 80-84) that the only purpose in seeking the names and addresses of petitioners' customers was improper and unauthorized. That purpose was alleged to be to enable OILSR to send letters to petitioners' customers advising them of their right to cancel their contracts of sale and demand refunds of their purchase payments because petitioners did not register and file the statement of record required by 15 U.S.C. §§1704-07. Petitioners denied respondent was conducting any "investigation" for the purpose of ascertaining any facts about whether or not the Act was violated.

The affidavit of petitioners' attorney recites the substance of a number of telephone conversations with Richard H. Heidermann and William Ginivan, officials in the Office of Interstate Land Sales Registration. On February 26, 1973, Mr. Ginivan stated that the purpose of demanding the customer lists was to enable OILSR to send form letters to the customers advising them of their right to rescind their land sale agreements if petitioners would not send out such letters. Mr. Ginivan stated that OILSR's procedure would be to wait for a determination that the Act had been violated: to order the "developer" (i.e., petitioners) to notify the customers of their right to rescind; and upon the refusal of the "developer" to do so, OILSR would provide such information and advice to the customer. This statement of purpose was repeated on the telephone the same day by Mr. Ginivan after he had

an opportunity to speak with his superior, Mr. Heidermann. At the personal meeting with petitioners' attorney on March 1, 1973, in Washington, Mr. Heidermann also stated that the purpose in seeking the names and addresses of customers was to provide purchasers with an opportunity to rescind their contracts if they desired to do so. A similar statement of intent was made by Mr. Ginivan on the telephone on June 5, 1973. R. 80-82.

On June 8, 1973, petitioners' attorney sent a letter to OILSR in care of Mr. Ginivan, in which it was stated in part as follows:

> "During our earlier discussions, and most recently on the telephone on June 5, 1973, you stated that your purpose in seeking the names and addresses of purchasers was to enable your Department to contact purchasers and advise them of their right to rescind their contracts. This purpose would appear to be wholly improper insofar as it relates to Priority of Washington and Priority of California because of the running of the statute of limitations. If the Act does in fact apply, the violations would have occurred at the time each sale was transacted and a disclosure statement not furnished the purchaser. The last such transaction occurred in June, 1971. The two year statute of limitations set forth in 15 U.S.C.A. §1711 would bar any relief to all such persons." R. 33;82-83.

On September 14, 1973, petitioners' attorney wrote a letter to an attorney in the Office of the General Counsel, Department of Housing and Urban Development, Washington, D.C., in response to the second

administrative subpoena. In this letter, petitioners' attorney stated:

> "There is no 'list' of purchasers of property. The names and addresses of purchasers are found in the business records of the company, but in no event will my client voluntarily produce the names of its customers. Such information is privileged and the use intended by the Department is an improper one. It has been made clear to me by Mr. Heidermann and Mr. Ginivan of the Department that the purpose of obtaining [the] customer lists is to notify all purchasers of their right to rescind their purchase agreements and obtain a refund of all monies paid. The last sale of the real property took place in June, 1971, and the two year statute of limitations set forth in 15 U.S.C. § 1711 bars relief even assuming there was a violation of the Act. . . ." R. 39; 83-84.

Petitioners' attorney's affidavit recites that at no time during his oral and written communications with OILSR and its various officials did any of its representatives repudiate any oral or written statements that their purpose in obtaining the lists of petitioners' customers was to advise them of their right to rescind for the failure of petitioners to file a statement of record. At no time did any of the officials of OILSR dispute or raise an objection to any erroneous statement, implication or inference in the two letters from petitioners' attorney confirming the purpose of respondent's "investigation" and purported need for the names and addresses of petitioners' customers. R. 84.[5]

[5]The practice described in the affidavit of petitioner's attorney appears to be the uniform practice followed by OILSR. See *Lukenas v. Bryce's Mountain Resort, Inc.*, 66 F.R.D. 69, 70-71 (W.D. Va. 1975).

The record contains ample documentation of the action intended by respondent had he obtained petitioners' customer lists. On October 16, 1973, Mr. Ginivan wrote a letter to a customer and stated in part:

> "While this Office is not legally allowed to act as your attorney, we are concerned with protecting the interest of purchasers as well as enforcement of the Act. In view of the fact that you purchased land from Priority Investments, Inc. without its filing a Statement of Record and Property Report with this Office, *you have the right, in our opinion, to cancel your Agreement of Sale as provided in Section 1404 (b) of the Interstate Land Sales Full Disclosure Act,* [15 U.S.C. §1709(b)] *and ask for a refund of any payments made in accordance with that Agreement.* However, we do not make refunds and are unable to represent you in any attempt to obtain one." [Emphasis added] R. 119.

On November 27, 1973, this customer wrote to petitioner Priority of Washington, reported the advice in Mr. Ginivan's letter, stated his intention to cancel his two agreements of sale and demanded a full refund of all purchase payments. R. 120. These contracts were entered into on October 25 and November 13, 1969, almost four years prior to the advice of Mr. Ginivan. R. 105.

On August 28, 1973, Mr. Ginivan wrote a letter to another customer of petitioner Priority of Washington, in which he said:

> "While this Office has not been given the statutory authority to act as your attorney, we are concerned with protecting the interests of purchasers as well as with the enforcement of the Act. In view of the fact that you purchased land from Priority Investments, Inc., without its filing a Statement of Record and Property Report with this office, *you have the right, in our opinion, to cancel your Agreement of sale as provided in §1404(b) of the Interstate Land Sales Full Disclosure Act,* [15 U.S.C. §1709(b)] *and ask for refund of any payments made in accordance with that agreement."* [Emphasis added] R. 122.

This later contract was entered into on June 30, 1970, more than three years prior to the advice of Mr. Ginivan. R. 105.

There was evidence that petitioner Priority of Washington received notification from two other customers of their desire to rescind their contracts and request restitution, based upon advice from OILSR. In both of these cases, the contracts sought to be rescinded had been entered into four and three-and-a-half years earlier, respectively. R. 105-07.

The letters to petitioners' customers from Mr. Ginivan emphasized "the right to cancel your agreement as provided in . . . [15 U.S.C. §1709(b)] . . .". Mr. Ginivan made no mention of the two year statute of limitations on that right provided in 15 U.S.C. §1711.

Over one year after issuing the second subpoena, the Administrator claimed new purposes for the earlier issued subpoenas.

Although the two subpoenas were issued on January 22, 1973, and on July 12, 1973, and petitioners at all times from and after February of 1973, clearly and unequivocally refused to surrender their customer lists,

there was no contact between petitioners and respondent after September 14, 1973. Thereafter, petitioners heard nothing from respondent until the petition for enforcement was filed in the district court on September 27, 1974. R. 1. The accompanying affidavit of John R. McDowell, Deputy Administrator of OILSR, stated new purposes for the earlier issued subpoenas. Mr. McDowell alleged there was an investigation to determine whether or not the Act had been violated and if,

> ". . . any actions were necessary for the protection of the public. Specifically, OILSR believes there may have been violations of the registration requirements of . . . the Act and the fraud provisions of . . . the Act . . . The names and addresses of purchasers are needed so that they can be contacted about the sales operations of the corporations. If investigation determines that a violation of the Act has taken place, the Secretary has the authority to bring an injunctive action or seek criminal sanctions . . ." R. 8.

Petitioners controverted these allegations. R. 61-62; 80-84. The record contains no evidence that OILSR made a single inquiry of any purchaser known to the agency concerning petitioners' "sales operations". OILSR simply sent the disputed letters to petitioners' customers providing erroneous legal advice having a natural tendency to disrupt petitioners' businesses. Furthermore, the Act provides no authority for the Secretary to "seek criminal sanctions".

As for respondent's "investigation" to determine if the registration requirements of the Act had been violated, this information was already known to OILSR. Petitioners had readily acknowledged their failure to register with OILSR because they denied they were subject to regulation by the Act and OILSR certainly knew who was registered in their own files and records.

Long before the commencement of proceedings in the district court, the Secretary made his initial determination on December 7, 1972 that petitioners fell within the scope of the Act and were required to register. R. 18. This determination was reaffirmed on April 26, 1973. R. 30. Respondent emphasized that petitioners "must file a Statement of Record pursuant to [15] U.S.C. 1706, for the land they are offering for sale". R. 30. The Secretary, of course, knew that petitioners had not registered with OILSR, and, despite his determination of the Act's applicability and hence the clear violation of the Act by petitioners if his determination was correct, the Secretary persisted in his demand for petitioners' customer lists. R. 30; 36. The use to be made of the customer lists was to enable OILSR to contact the petitioners' customers to advise them of their right to rescind their contracts because petitioners failed to file a "Statement of Record". R. 33; 39; 80-86.

Mr. Ginivan's letters to the customers also stated:

> ". . . Priority has stated that it does not agree with our decision [that the Act applies] and does not believe the sales were in violation of the Act. We are in the process of taking appropriate action pursuant to the Act." R. 118; 122.

To date, no "appropriate action" has been instituted to determine whether OILSR's publicized "decision" is correct. Such an action would require a determination on the merits of the applicability of the Act, a determination respondent has long sought to avoid. The only effort to obtain a judicial determination was made by petitioners in their counterclaim in the district court. Despite the inference of wrongdoing in Mr. Ginivan's letters to the customers, OILSR has carefully avoided and resisted any fair means for presenting the issue squarely to the courts.

Contrary to respondent's representation of his purposes in the district court, as late as September 25, 1975, OILSR once again clearly stated its intention to use the customer lists of petitioners ". . . to notify all purchasers of their rights to void their contracts and receive a refund of all monies paid on account of their contracts". App. pp. 23a-24a. In a letter to an attorney for one of petitioners' customers who had executed a contract of sale beyond the statutory period, the Assistant Deputy Administrator of OILSR showed his utter contempt for both the law he is charged with administering and the federal courts who have adjudicated the statute when he wrote:

> "Further, since your clients signed the agreement more than two years ago, you should be aware that there are two federal court decisions holding that a lawsuit to recover a refund on purchases more than two years old would be barred by the statute of limitations. *We do not agree with that position.* In our opinion, the statute of limitations as delineated in Section 1412 of the

> Act is at least three years in duration and in the case of a damage action for fraud may be a continuing violation." App. p. 23a. (emphasis added).

As pointed out earlier in this Petition, *all* of the land sale contracts executed by petitioners' customers were executed more than three years ago. There can be little doubt that the present administrators of the Act are not interested in the limitations of the statutory enactment and are more interested in disrupting petitioners' businesses. The Administrators clearly view the subpoena enforcement proceedings as punitive rather than simply as a means of conducting an investigation to determine whether or not the Act has been violated. The news release of March 5, 1975, following the entry of the order of the district court enforcing the subpoenas, announced the order as though there had been a judicial determination that petitioners were in violation of the law. App. at p. 20a. Interestingly, it is only petitioners, and not respondent, who have sought a determination of the Act's applicability in their counterclaim.

OPINION OF THE COURT OF APPEALS

Without benefit of findings by the district court, the Court of Appeals assumed respondent was conducting an "investigation" of petitioners' businesses and that there were two legitimate purposes for the "investigation": to look for evidence to be used in a possible injunctive action and to secure information to serve as a basis for further legislation. App. pp. 6a-9a. The first

purpose was advanced by the affidavit in support of the order to show cause and was denied by petitioners. The second purpose was not even mentioned by anyone in the record before the district court and did not surface until government counsel on appeal suggested it in his appellate brief. The Court of Appeals determined, with the consent of government counsel on appeal, that the erroneous legal advice provided by the letters of OILSR was improper and petitioners were entitled to a protective order prohibiting the Administrator from writing such letters to petitioners' customers. App. pp. 12a-13a. However, the Court of Appeals held that petitioners were not entitled to an evidentiary hearing to either determine the existence of the "investigation" and its purposes or to define the scope of the protective order. While noting there was an appeal by petitioners from the order dismissing their counterclaim (App. p. 2a), the Court of Appeals did not decide the merits of that appeal.

The Court of Appeals stayed its mandate pending determination of this Petition.

REASONS FOR GRANTING THE WRIT

1. The decision of the Court of Appeals approving a procedure denying petitioners both an evidentiary hearing and discovery is in direct conflict with the decision of the Third Circuit in *United States v. McCarthy*, 514 F.2d 368, 372-73 (1975), where the opinion by Chief Judge Seitz set out a clear, reasonable and fair procedure to be followed in enforcement

cases. The Third Circuit suggested that a hearing be held to consider contested issues brought into controversy by the responsive pleading and supported by affidavit. At the hearing, the agency should be prepared to prove the allegations of the complaint and to rebut any proper defenses asserted by the person summoned. The person summoned should be prepared to produce any evidence rebutting the government's case and to also assume the burden as to affirmative issues raised by him for the purpose of demonstrating that enforcement would constitute an abuse of the court's process. After completion of the hearing, the district court should make the requisite findings of fact and conclusions of law in conformance with the Fed. R. Civ. P. 52(a).

The protective order of the Court of Appeals grafted onto the district court's order enforcing the subpoenas in the present case protected petitioners against respondent's improper purpose in issuing the subpoenas. Petitioners alleged that there was no other intended purpose and no "investigation" to ascertain facts was being conducted by respondent. Petitioners had no opportunity to prove their allegations.

The Ninth Circuit's decision in the present case is also, interestingly, at odds with another recent decision of the same court where it held, ". . . the summonee must be afforded at least *some* opportunity to substantiate its allegations". *United States v. Church of Scientology of California*, 502 F.2d 818, 822 (9th Cir. 1975) (emphasis in original). Petitioners were not afforded an opportunity to do so either by an eviden-

tiary hearing or discovery. The procedure approved in the present case is unique, for it is quite clear from the reported decisions that Internal Revenue Service agents routinely testify in support of the summons issued by them.[6] Research has disclosed no prior cases where the government has taken the position, asserted here, that both discovery and an evidentiary hearing should, or even could, be denied. In the reported decisions the government has argued that denial of pre-hearing discovery is conditioned upon making the agent issuing the summons available for in court examination.[7]

There is no justification for the attempt by the Court of Appeals to distinguish between investigations self-initiated by the agency itself and those initiated at the request of third persons. App. p. 11a. If the facts are as reported by petitioners' attorney, that OILSR had only a single purpose in issuing the sub-

[6] *United States v. Bisceglia*, 420 U.S. 141, 156 n.3 (1975); *United States v. Interstate Tool & Engineering Corp.*, 526 F.2d 59, 60-61 (7th Cir. 1975); *United States v. Fisher*, 500 F.2d 683, 688-89, n.4 (3rd Cir. 1974), cert. granted, 95 S.Ct. 824 (1975); *United States v. Hodgson*, 492 F.2d 1175, 1176-78 (10th Cir. 1974); *United States v. Henry*, 491 F.2d 702, 704 (6th Cir. 1974); *United States v. Friedman*, 388 F.Supp. 963, 965 (W.D. Pa. 1975); *United States v. Cutter*, 374 F.Supp. 1065, 1067 (W.D. N.C. 1974); *United States v. Kahn*, 373 F.Supp. 145, 146 (W.D. Mo. 1973); *United States v. Kessler*, 338 F.Supp. 420, 421 (S.D. Ohio 1972), rev'd on other grounds, 474 F.2d 995 (6th Cir. 1973), on remand, 364 F.Supp. 66, 67 (E.D. Ohio 1973); *United States v. Smith*, 373 F.Supp. 14, 17-18 (S.D. Miss. 1974); *United States v. Union National Bank*, 371 F.Supp. 763, 767-68 (W.D. Pa. 1974); *United States v. Sun First National Bank of Orlando*, 510 F.2d 1107, 1109-10 (5th Cir. 1975); *United States v. Howard*, 360 F.2d 373, 378-79 (3rd Cir. 1966).

[7] *United States v. Salter*, 432 F.2d 697, 700 (1st Cir. 1970); *United States v. Lomar Discount Limited*, 61 F.R.D. 420, 422 (N.D. Ill. 1973), *aff'd without opinion*, 498 F.2d 1404 (7th Cir. 1974).

poenas, to provide erroneous advice now determined by the Court of Appeals to be "not a legitimate purpose", then there is no need for the intrusion by OILSR into the affairs of petitioners. The record contains ample evidence that there was no other purpose in subpoenaing petitioners' customer lists. Petitioners should have been permitted at least some opportunity to prove their verified allegations. A person served with an IRS summons would have been provided such an opportunity. Those served by subpoenas issued by other agencies are entitled to no less protection.

2. The decision of the Court of Appeals has decided the following important questions of law which have not been, but should be settled, by this Court:

A. Do the procedural rules applicable to Internal Revenue Service summons enforcement cases laid down by this Court in *Reisman v. Caplin*, 375 U.S. 440, 449 (1964), *United States v. Powell*, 379 U.S. 48, 57-58 (1964), *Donaldson v. United States*, 400 U.S. 517, 529-30 (1971), and *United States v. Bisceglia*, 420 U.S. 141, 146 (1975), apply with equal force and effect to proceedings to enforce subpoenas issued by other agencies?

B. May a district court entertaining a petition to enforce an administrative subpoena order enforcement without permitting the subpoenaed party to have any opportunity to inquire into the purpose of the investigation, either by way of an adversary hearing or discovery?

C. Must a district court make and enter findings of fact and conclusions of law in conformity with Rule 52(a), Fed. R. Civ. P., in enforcement cases?

D. May a reviewing court assume certain factual allegations in a petition for enforcement and supporting affidavit to be true, despite the direct contradiction of those factual allegations in the opposing verified answer and affidavits of the subpoenaed party and its attorney, in absence of findings by the district court?

E. May a subpoenaed party file a counterclaim for declaratory relief in a proceeding to enforce administrative subpoena?

F. If a notice of appeal is filed from an order dismissing a counterclaim, must a reviewing court decide that appeal or may the reviewing court simply disregard that appeal?

3. The decision of the Court of Appeals has so far departed from the accepted and usual course of judicial proceedings and has sanctioned such departure by the district court, as to call for an exercise of this Court's power of supervision.

Dated, August 5, 1976.

Respectfully submitted,

ARTHUR BRUNWASSER,
Attorney for Petitioners.

EPHRAIM MARGOLIN,
Of Counsel.

(Appendix Follows)

APPENDIX

Appendix

United States Court of Appeals
for the Ninth Circuit

No. 75-1617

James T. Lynn, Secretary of the Department of Housing and Urban Development,
Petitioner-Appellee,

vs.

A. E. Biderman; Richard Yagle; Priority Investments, Inc. (Washington); Capital Investments, Inc.; Peerless Research Inc.; and Priority Investments, Inc., (California),
Respondents-Appellants.

Priority Investments, Inc., a Washington corporation; Capital Land Investments, Inc., a Washington Corporation; Peerless Research, Inc., a Washington Corporation; Priority Investments, Inc., a California Corporation,
Counterclaimants-Appellants.

[May 24, 1976]

On Appeal from the United States District Court
for the Northern District of California

OPINION

Before: BROWNING and HUFSTEDLER, Circuit Judges, and THOMPSON,* District Judge.

THOMPSON, District Judge:

This is an appeal from an order of the district court (a) enforcing the subpoena duces tecum issued

*Honorable Bruce R. Thompson, United States District Judge, District of Nevada, sitting by designation.

by Petitioner-Appellee ("Appellee") in the course of an investigation under the Interstate Land Sales Full Disclosure Act, 15 U.S.C.A. § 1701, et seq.; and (b) dismissing the counterclaim for declaratory and injunctive relief filed by Respondents-Appellants ("Appellants").

The Interstate Land Sales Full Disclosure Act ("Act") requires persons[1] engaged in certain interstate sales or leasings of land[2] to register the offering by filing a statement with the Department of Housing and Urban Development ("HUD"). 15 U.S.C.A. §§ 1704, 1705. Those sellers covered by the Act are also required to furnish a property report to prospective purchasers containing information as required by the Secretary of HUD. 15 U.S.C.A. § 1709(a).

Under the Act, it is unlawful for any developer to use the mails or other instruments of interstate commerce to sell or lease any lot in any subdivision unless a statement of record is filed with the Secretary of HUD. It is also unlawful for any developer to defraud or deceive a purchaser. 15 U.S.C.A. § 1703(a). If a property report is not given to a purchaser before he signs an agreement to purchase, the agreement is voidable at the option of the purchaser. 15 U.S.C.A. § 1703(b).

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[1]The Act applies to "developers" as defined in 15 U.S.C.A. § 1701, (4).

[2]The Act applies to land sold or leased as a "subdivision" as defined in 15 U.S.C.A. § 1701(3) subject to exemptions in 15 U.S.C. §§ 1702 and 1710.10(1).

A purchaser may sue for money damages. 15 U.S.C.A. § 1709. Additionally, the Secretary may bring an action to enjoin acts or practices which may violate the Act (15 U.S.C.A. § 1714(a)), and he may make investigations as he deems necessary to determine whether any person has violated or is about to violate the Act. 15 U.S.C.A. § 1714(b).

The Act contains a limitation of actions section which provides that an action for damages based on an untrue statement or omission in the property report must be brought within one year after the discovery of the statement. The section further provides that an action for rescission based on fraud or the failure of the developer to file a report must be brought within two years. Finally, the section provides that "in no event shall any action be brought by a purchaser more than three years after the sale or lease of the property to him." 15 U.S.C.A. § 1711.

The Office of Interstate Land Sales Registration (OILSR), a division of HUD, received purchaser complaints concerning the land sales activities of Priority Investments, Inc. (Washington), Peerless Research, Inc., Capital Land Investments, Inc. and Priority Investments, Inc. (California). OILSR then initiated the investigation which is the subject of this action.

On January 22, 1973, in the course of the investigation, OILSR issued a subpoena requiring A. E. Biderman to appear to testify and to produce certain documents pertaining to the sales activities of Priority (Washington), Peerless and Capital Land. On July

12, 1973, OILSR issued a subpoena requiring Richard Yagle to appear to testify and to produce certain documents pertaining to the sales activities of Priority (California). Mr. Biderman and Mr. Yagle partially complied with the subpoenas but refused to provide OILSR with the names and addresses of purchasers and copies of the sales contracts and deeds.

The affidavit of John McDowell, Deputy Administrator, OILSR, which was attached as an exhibit to the petition for the enforcement of the subpoenas, discloses that the purpose of the investigation is to determine whether appellants violated the registration requirements of the Act or the fraud provisions of the Act. The affidavit further relates:

> "The information sought in the subpoenas but refused to OILSR is material and essential to this investigation. The names and addresses of purchasers are needed so that they can be contacted about the specifics of the sales operations of the corporations. If the investigation determines that a violation of the Act has taken place, the Secretary has the authority to bring an injunctive action or seek criminal sanctions pursuant to 15 U.S.C. § 1714(a) and 1717."

On September 24, 1974, appellee filed in the district court the petition seeking enforcement of the subpoenas. The district court issued an order to show cause why the petition should not be granted. Appellees filed an answer to the petition, four affidavits in response to the order to show cause, and a counterclaim for declaratory and injunctive relief. The district court then issued orders enforcing the administrative subpoenas and dismissing the counterclaim and this appeal ensued.

Appellant raises three primary issues respecting this appeal:

1. Were the administrative subpoenas duces tecum issued for a legitimate purpose?

2. Should the district court have allowed reasonable discovery with respect to the question of the legitimacy of the purpose of the administrative subpoenas duces tecum? In the alternative, should the district court have conducted an evidentiary hearing with respect to that question?

3. Did the district court abuse its discretion in dismissing appellant's counterclaim for declaratory and injunctive relief?

In *United States v. Powell,* 379 U.S. 48, 57-58 (1964), the Supreme Court established the standard for obtaining judicial enforcement of administrative subpoenas issued by an agency. In that case, the Internal Revenue Service sought the judicial enforcement of a subpoena it had issued in the course of an investigation of a taxpayer. The Court held that the Internal Revenue Service need not meet a "standard of probable cause to investigate" to secure judicial enforcement of its subpoena, but it must show (1) that the investigation will be conducted pursuant to a legitimate purpose; (2) that the inquiry may be relevant to that purpose; (3) that the information sought is not already within the possession of the agency; and (4) that the administrative steps required by Congressional guidelines have been followed.

The standard established in *Powell* was reaffirmed in *Donaldson v. United States,* 400 U.S. 517, 526-527 (1971); see, also, *United States v. Church of Scientology,* 520 F. 2d 818, 821 (9th Cir. 1975). Standards which parallel that established in *Powell* have been established with respect to subpoenas issued by other administrative agencies. See, e.g., *United States v. Morton Salt Co.,* 338 U.S. 632 (1950); *Oklahoma Press Pub. Co. v. Walling,* 327 U.S. 186 (1946).

The two aspects of the *Powell* standard which are in issue in this case are, first, whether the investigation is being conducted pursuant to a legitimate purpose, and second, whether the inquiry is relevant to that purpose. There has been no suggestion that OILSR already has the information it seeks in the subpoenas or that it failed to correctly follow administrative procedure.

Appellant's argument can be summarized as follows:

HUD and OILSR wanted the customer lists to notify customers that appellants had failed to register with the agency so that those customers could rescind their contracts and sue for damages. Those purposes are illegitimate, appellants contend, because the limitations periods provided in the Act for the respective remedies had run and, in advising customers of their rights to pursue actions, OILSR was disregarding the limitations periods.

Appellants further argue that the only other civil remedy which is even arguably available to appellee, an order by the Secretary to enjoin sales violating

the Act, is not available in this instance because appellants have voluntarily ceased selling land. And, since the only civil remedies provided for in the Act are now foreclosed, the investigation is being conducted either to disrupt appellants' businesses or to lead to a criminal prosecution, either of which is impermissible.[3]

In arguing that they have a defense to actions for damages or rescission should such actions be filed, appellants misconstrue the nature of the investigation and the nature of the summary proceeding to enforce or deny the administrative subpoenas. The affidavits appellants submitted in opposition to the petitions relate that the last sale of real property by Peerless Research was on or about January 19, 1973 (R. 87), the last sale by Priority Investment (California) was on or about April 13, 1971 (R. 93), and the last sale by Priority Investments (Washington) was on or about June 29, 1971 (R. 99). Taken as true, the information in the affidavits establishes that the limitations period has run and the customers no longer may rescind their contracts or successfully claim damages. See *Hall v. Bryce's Mountain Resort,* 379 F. Supp. 165 (W.D. Vir. 1974); *Melborn v. Amrep,* 373 F. Supp. 1378 (M.D. Pa. 1974). It should be noted, however, that when the investigation began, the information which shows that private civil causes of action may

[3]An Administrative summons cannot be used for the purpose of conducting a criminal investigation. *United States v. Kordel,* 397 U.S. 1, 11-12 (1970). But when no criminal case is actually pending, a summons issued for a civil purpose may be enforced even when it is also used to uncover crime. *United States v. Bell,* 448 F. 2d 40, 41-42 (9th Cir. 1971).

be barred was in the exclusive control of appellants. That information was clearly relevant to the purpose of the initial inquiry which was to determine if any violations of the Act had taken place.

It is not an answer, to a suit for injunctive relief brought by the Secretary, to contend that appellants have voluntarily ceased selling land. In order to successfully contend that injunctive litigation is now moot, appellants would have to demonstrate that there is no reasonable expectation that the wrong will be repeated. See *United States v. W. T. Grant,* 345 U.S. 629, 633 (1953); *SEC v. Manor Nursing Ctrs., Inc.,* 458 F. 2d 1082, 1101 (2nd Cir. 1972). Since it is questionable that appellants would have a defense to a suit for injunctive relief, it is clear that appellants should not be able to thwart an investigation which may or may not lead to such a suit. The names of past customers are relevant to an investigation which has an objective of obtaining injunctive relief because it is important to ascertain how appellants secure sales leads and what sales techniques are employed.

The purpose of the HUD-OILSR investigation is legitimate for a further purpose. The Secretary is authorized, under 15 U.S.C.A. § 1714(b), to secure information to serve as a basis for recommending further legislation. The lists of customers of those companies which may have violated the Act at one time or another are relevant to the legitimate purpose of accumulating information so that the Secretary can recommend future legislation. See, generally, *SEC v.*

Brigadoon Scotch Distributing Co., 480 F. 2d 1047 (2nd Cir. 1973), in which the Court reasoned that the burden of showing that agency subpoenas are unreasonable remains with the individuals subpoenaed, and where the agency inquiry is authorized by law and materials sought are relevant to the inquiry, the burden is not easily met.

In *United States v. Church of Scientology, supra,* this Court considered whether discovery or an adversary hearing is required to assist the Court in determining whether or not to enforce an administrative summons. In that case, the Internal Revenue Service ordered a church officer to appear to testify and to produce records relating to the tax liability of the church. The church officer resisted, contending that the Internal Revenue Service investigation was being conducted in bad faith for the sole purpose of harassing the church. The district court enforced the Internal Revenue Service summons without allowing discovery or holding an evidentiary hearing.

This Court acknowledged that the Federal Rules of Civil Procedure apply to a proceeding to enforce an administrative summons but concluded that the district court has discretion to limit the application of the Rules to preserve the summary nature of the proceeding. This Court held that the district court did not err in declining to allow the taxpayer to conduct preenforcement discovery. 520 F. 2d at 824. This Court further held that the district court did err in declining to hold a limited evidentiary hearing to allow the taxpayer to inquire into the purpose of the

Internal Revenue Service investigation, 520 F. 2d at 525. See, also, *United States v. McCarthy,* 514 F. 2d 368 (3rd Cir. 1975); *United States v. Salter,* 432 F. 2d 697 (1st Cir. 1970); *United States v. Turner,* 480 F. 2d 272 (7th Cir. 1973). In each of those cases, the Court held that a limited evidentiary hearing was required to give the individual summoned by the Internal Revenue Service an opportunity to substantiate the allegation that the purpose of the investigation was to harass the taxpayer.

The requirement that a court conduct a limited evidentiary hearing before enforcing an administrative summons when the motive of the agency has been attacked has been discussed most extensively in cases concerning the Internal Revenue Service. There appears to be no reason why the requirement is not applicable to investigations conducted by other agencies. Cf. *Shasta Minerals & Chemical Co. v. SEC,* 328 F. 2d 285, 288 (10th Cir. 1964); *NLRB v. Costello,* 296 F. Supp. 1035, 1037 (D. Conn. 1968).

The key question with respect to this issue is: Were the allegations of appellants sufficient to raise a doubt regarding the purpose of HUD-OILSR in conducting an investigation to require the court to conduct an evidentiary hearing? In *Church of Scientology, supra,* the taxpayer argued that the harassment purpose of the Internal Revenue Service was demonstrated in the fact that the Service repeatedly imposed tax assessments on churches of Scientology but then stopped short of litigating the cases on the merits. This Court characterized the taxpayer's allegations as "thin" but,

nevertheless, held that an evidentiary hearing was required.

There is one difference between the method by which OILSR conducted this investigation and the method generally employed by the Internal Revenue Service. That difference is significant with respect to the question of whether the district court should hold an evidentiary hearing when the individual summoned protests that an investigation is being conducted in bad faith. OILSR initiated its investigation after it was indirectly requested to do so by a number of customers of the appellants. Internal Revenue Service investigations are typically self-initiated. There is arguably less chance of agency oppression when the investigations are conducted at the request of an aggrieved purchaser. The Court noted the problem of agency-initiated investigations in *Church of Scientology, supra,* 520 F. 2d at 823, when it said:

> "The Church's allegations have more substance than meets the eye. See e.g. Center on Corporate Responsibility, Inc. v. Schultz, D.D.C. 1973, 368 F. Supp. 863 (evidence of White House use of IRS administrative actions against certain 'activist' organizations whose views were offensive to the White House)."

The district court had before it, when it made the determination to enforce the subpoenas duces tecum, the affidavits of John R. McDowell, William J. Ginivan and Richard H. Heidermann in support of enforcement and the affidavits of A. E. Biderman, Arthur Brunwasser, James Stefan and Richard Yagle

in opposition to enforcement. There is no indication whatsoever that anything would have been accomplished by an evidentiary hearing and the Court did not abuse its discretion by deciding the case summarily on the affidavits before it.

It is apparent from the record that there were one or more legitimate purposes for the administrative subpoena. It is also apparent that it was the firm intention of the Administrator, after the customer lists were obtained, to write to each of the purchasers informing them that they had a right to void their contracts and receive a refund of all monies paid on account of their contracts. This, in our opinion, was not a legitimate purpose. Such advice was quite probably erroneous and was not authorized by the law.

It is not, however, a ground to deny enforcement of a subpoena that it is being employed for a wrongful purpose if there is also a legitimate purpose for the subpoena. *Donaldson v. United States,* 400 U.S. 517 (1971); *Weld v. United States,* 362 F.2d 206 (9th Cir. 1966).

In *SEC v. Wall Street Transcript Corp.,* 422 F.2d 1371 (2nd Cir. 1970), in a case concerning the enforcement of an SEC subpoena duces tecum, the Court considered whether it was appropriate to issue a protective order if the Court determined that the subpoena should be enforced. The Court said:

> "If the production of materials sought by the Commission's subpoena in this case does threaten any unusual disruption of the Transcript's normal operations, the appellee is, of course, free to ask the district court for appropriate protective limitations." See: *Oklahoma Press, supra, Id.* at 1381.

Here, appellants asked for a protective order in the answer to the petition (R. 64) and argued for the protective order in the memorandum in opposition to the order to show cause (R. 159). It appears that the district judge did not specifically rule on the request for a protective order.

In our opinion, appellants were entitled, under the record before us, to a protective order prohibiting the Administrator from writing appellants' customers a positive advice letter of the tenor indicated. On oral argument, Government counsel agreed with this position.

The order enforcing subpoena entered by the district court is affirmed, with the addition thereto of a protective order precluding the Administrator of the Office of Interstate Land Sales Registration from advising appellants' customers that they have a right to rescind their contracts and recover back any money paid thereunder.

United States Court of Appeals
for the Ninth Circuit

No. 75-1617

James T. Lynn, Secretary of the Department of Housing and Urban Development,
Petitioner-Appellee,

vs.

A. E. Biderman, et al.,
Respondents-Appellants.

Priority Investments, Inc., et al.,
Counterclaimants-Appellants.

[Jul. 8, 1976]

ORDER

Before: BROWNING and HUFSTEDLER, Circuit Judges, and THOMPSON,* District Judge

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a hearing in banc.

The full court has been advised of the suggestion for in banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing in banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing in banc is rejected.

*Honorable Bruce R. Thompson, United States District Judge, District of Nevada, sitting by designation.

In the United States District Court for the
Northern District of California

No. C-74-2077 ACW

James T. Lynn, Secretary of the Department of Housing and Urban Development,
Petitioner,

vs.

A. E. Biderman, et al.,
Respondents.

Priority Investments, Inc., a Washington Corporation, et al.,
Counterclaimants.

[Filed Feb. 18, 1975]

ORDER DISMISSING COUNTERCLAIM

This is an action brought by the Secretary of the Department of Health, Education and Welfare to enforce an administrative subpoena issued pursuant to the Secretary's subpoena power under the Interstate Land Sales Full Disclosure Act, 15 U.S.C. §§ 1700, et seq. Respondents have resisted enforcement of the subpoena and have filed a counterclaim for declaratory and injunctive relief against the Secretary.

Rule 13 of the Federal Rules of Civil Procedure permits the filing of counterclaims in civil actions

under certain circumstances. An action to enforce an administrative subpoena, however, is a summons proceeding, and the Court has discretion to limit the applicability of the Federal Rules of Civil Procedure in such an action if it is considered appropriate in order to expedite a decision on the enforcement of the subpoena. *Donaldson v. United States,* 400 U.S. 517, 528-29 (1971). Respondents urge the Court to exercise that discretion in favor of permitting the counterclaim in this action because they claim the Secretary intends to use the information sought in the subpoena for improper purposes, and that if permitted to litigate their counterclaim they can establish that the subpoena is unlawful and should not be enforced.

The unlawful purpose alleged by Respondents is the intent of the Secretary to use Respondents' customer lists (sought in the subpoena) to notify these customers that in the Secretary's opinion they have the right under the Interstate Land Sales Full Disclosure Act, *supra,* to rescind their contracts entered into with Respondents and to recover from Respondents all moneys paid in. Under Section 1415(b) of the Act, 15 U.S.C. § 1714(b), the Secretary is authorized to investigate suspected violations of the Act and "in his discretion, to publish information concerning any such violations . . . ." Informing Respondents' customers of a possible violation of the Act and of the terms of the Act and of persons' rights under the Act are therefore legitimate actions by the Secretary, are authorized under the Act, and do not

constitute an improper use of information obtained through the use of the subpoena power.

Accordingly, the counterclaim of Respondents fails to state a claim upon which relief can be granted, and

It Is Hereby Ordered that Petitioner's motion pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure to dismiss Respondents' counterclaim is GRANTED, and the counterclaim is DISMISSED.

Dated: February 18, 1975.

Albert C. Wollenberg
United States District Judge

In the United States District Court for the Northern District of California

No. C-74-2077 ACW

James T. Lynn, Secretary of the Department of Housing and Urban Development,
Petitioner,
vs.
A. E. Biderman, et al.,
Respondents.

Priority Investments, Inc., a Washington Corporation, et al.,
Counterclaimants.

[Filed Feb. 19, 1975]

ORDER MODIFYING "ORDER DISMISSING COUNTERCLAIM" FILED FEBRUARY 18, 1975

It Is Hereby Ordered that the Court's Order Dismissing Counterclaim filed herein on February 18, 1975, is modified pursuant to Rule 52(b) of the Federal Rules of Civil Procedure so the words "Department of Health, Education and Welfare", appearing on line two of page one of that Order are deleted and replaced with the words "Department of Housing and Urban Development".

Dated: February 19, 1975.

Albert C. Wollenberg
United States District Judge

In the United States District Court for the Northern District of California

C-74-2077 ACW

James T. Lynn, etc.,
Petitioner,
vs.
A. E. Biderman, et al.,
Respondents.

[Filed Feb. 19, 1975]

ORDER ENFORCING SUBPOENA

This matter having come regularly on for hearing before the Court upon the Secretary of Housing and Urban Development's petition for enforcement of administrative subpoenas and a form Order to Show Cause;

The Order to Show Cause having been issued on Sept. 27, 1974 and Respondents having filed a return to said order, the respective parties having been afforded an opportunity to be heard and briefs having been submitted and the Court being fully advised in the premises,

It Is Hereby Ordered, that Respondents A. E. Biderman and Richard Yagle appear before a duly authorized designee of the Secretary on March 17, 1974 at 10:00 a.m. in Room 9262, 451 Seventh Street,

S.W., Washington, D. C. to testify and produce the customer lists and contracts of sale and/or deeds executed since April 27, 1969 as more fully described in the subpoenas herein.

Dated: 2/19/75

/s/ Albert C. Wollenberg
United States District Judge

Murphy

HUD News

U.S. Department of Housing and Urban Development
Washington D.C. 20410

HUD-No. 75-65
Phone (202) 755-5284
(Farley)

For Release:
Wednesday
March 5, 1975

The U.S. Department of Housing and Urban Development has won a significant decision in a court battle with a West Coast developer who refused to produce his list of customers in the course of a HUD investigation.

The order to turn over the list to the Federal agency was given by U.S. District Judge Albert C. Wollenberg in San Francisco, and was directed against A. E. Biderman of Priority Investments, Inc., Seattle, Wash., and Richard Yagle, of Priority Investments, Inc., San Francisco, Calif.

It was announced by John R. McDowell, acting Administrator for HUD's Office of Interstate Land Sales Registration, which was investigating four com-

panies for possible violation of the registration and fraud provisions of the Interstate Land Sales Full Disclosure Act.

The Seattle office of Priority Investments is one of the four. The other three are Capital Land Investments, Inc. and Peerless Research, Inc., both of Seattle, and Priority Investments, Inc., of San Francisco.

Although the property under investigation is located in California's Antelope Valley, the developers solicited customers in the Seattle area and in Portland, Ore., as well as in Southern California.

They advertized themselves as experts in land investments. "And," said Mr. McDowell, "it must have been sheer coincidence that in every instance one company was able to recommend one of the other three."

The court order enforced an administrative subpoena for the list of customers, estimated at about 500. Pursuant to the decision, HUD may now inform them of the rights under the Act.

Gross

Sep 26 1975

Mr. Michael E. Stevenson
Attorney at Law
Suite 2100
Washington Plaza Building
One Washington Plaza
Tacoma, Washington 98402

Dear Mr. Stevenson:

Subject: Priority Investments, Inc.

Reference is made to your letters dated June 23, July 8, and August 12, 1975, on behalf of your client that purchased property from the subject corporation. Please excuse the delay in responding.

This Office administers the Interstate Land Sales Full Disclosure Act which became effective April 28, 1969. Specifically, the Act requires land developers engaged in interstate commerce unless otherwise exempt, to file certain information pertaining to their subdivision with this Office, and to provide such information in the form of a Property Report to prospective purchasers prior to or at the time of signing a contract or agreement of sale. Generally covered under the Act is any sale or lease of real estate pursuant to a common promotional plan to offer or sell 50 or more lots in a subdivision, any of which are less than 5 acres in size.

A Statement of Record and Property Report have not been filed with this Office. We have been communicating with them for some time and as part of our investigation we subpoenaed their records. They

refused to honor the administrative subpoena whereupon we went into court to enforce the subpoena and the court ordered the developer to respond. Enclosed is a copy of the action which is presently on appeal in the Ninth Circuit Court in San Francisco together with a copy of the judge's decision. Until a decision is made on the appeal this Office can do nothing further.

From our information we believe they come within the jurisdiction of the Act but the developer is contesting jurisdiction. We also believe the developer's failure to register may entitle your client to void his contract pursuant to Section 1404(b) of the Act or may be used as a defense in an action to enforce any further payments to the developer. Sections 1404 and 1410 also provide for damage suits for fraud.

Further, since your client signed the agreement more than two years ago, you should be aware that there are two federal court decisions holding that a lawsuit to recover a refund on purchases more than two years old would be barred by the statute of limitations. We do not agree with that position. In our opinion, the statute of limitations, as delineated in Section 1412 of the Act, is at least three years in duration and in the case of a damage action for fraud may be a continuing violation. The developer disagrees with our opinion and may resist in court your efforts to obtain a refund or sue for damages and may deny that any such rights exist.

When this Office receives the records of the corporation, we will request the developer to notify all pur-

chasers of their rights to void their contracts and receive a refund of all monies paid on account of their contracts.

Enclosed is a copy of the Act and Regulations as amended December 1, 1973. If this Office can be of further assistance, please let us know.

Sincerely,

By Alan J. Kappeler
Assistant Deputy Administrator

John R. McDowell
Interstate Land Sales Administrator (Acting)
Enclosures
cc:
Chron 9262
OILSR-LSED
Sauerbrunn 10150

RLW:Gross:slb drafted 9/16/75 retyped 9/23/75
Originator RLW Gross /s/ 9/24/75
Concurrence RLW Glaspe (initialed RMG) 9/24/75
Concurrence RL Adams (initialed WA) 9/25

TITLE 15

INTERSTATE LAND SALES

§ 1701. *Definitions*

For the purposes of this chapter, the term—

(1) "Secretary" means the Secretary of Housing and Urban Development;

(2) "person" means an individual, or an unincorporated organization, partnership, corporation, trust, or estate;

(3) "subdivision" means any land, located in any state or in a foreign country, which is divided or proposed to be divided into fifty or more lots, whether contiguous or not, for the purpose of sale or lease as part of a common promotional plan and where subdivided land is offered for sale or lease by a single developer, or a group of developers acting in concert, and such land is contiguous or is known, designated, or advertised as a common unit or by a common name such land shall be presumed, without regard to the number of lots covered by each individual offering, as being offered for sale or lease as part of a common promotional plan;

(4) "developer" means any person who, directly or indirectly, sells or leases, or offers to sell or lease, or advertises for sale or lease any lots in a subdivision;

(5) "agent" means any person who represents, or acts for or on behalf of, a developer in selling or leasing, or offering to sell or lease, any lot or

lots in a subdivision; but shall not include an attorney at law whose representation of another person consists solely of rendering legal services;

(6) "blanket encumbrance" means a trust deed, mortgage, judgment, or any other lien or encumbrance, including an option or contract to sell or a trust agreement, affecting a subdivision or affecting more than one lot offered within a subdivision, except that such term shall not include any lien or other encumbrance arising as the result of the imposition of any tax assessment by any public authority;

(7) "interstate commerce" means trade or commerce among the several States or between any foreign country and any State;

(8) "State" includes the several States, the District of Columbia, the Commonwealth of Puerto Rico, and the territories and possessions of the United States;

(9) "purchaser" means an actual or prospective purchaser or lessee of any lot in a subdivision;

(10) "offer" includes any inducement, solicitation, or attempt to encourage a person to acquire a lot in a subdivision.

§ 1702. *Exemptions*

(a) Unless the method of disposition is adopted for the purpose of evasion of this chapter, the provisions of this chapter shall not apply to—

(1) the sale or lease of real estate not pursuant to a common promotional plan to offer or sell fifty or more lots in a subdivision;

(2) the sale or lease of lots in a subdivision, all of which are five acres or more in size;

(3) the sale or lease of any improved land on which there is a residential, commercial, or industrial building, or to the sale or lease of land under a contract obligating the seller to erect such a building thereon within a period of two years;

(4) the sale or lease of real estate under or pursuant to court order;

(5) the sale of evidences of indebtedness secured by a mortgage or deed of trust on real estate;

(6) the sale of securities issued by a real estate investment trust;

(7) the sale or lease of real estate by any government or government agency;

(8) the sale or lease of cemetery lots;

(9) the sale or lease of lots to any person who acquires such lots for the purpose of engaging in the business of constructing residential, commercial, or industrial buildings or for the purpose of resale or lease of such lots to persons engaged in such business;

(10) the sale or lease of real estate which is free and clear of all liens, encumbrances, and adverse claims of each and every purchaser or his

or her spouse has made a personal on-the-lot inspection of the real estate which he purchased and if the developer executes a written affirmation to that effect to be made a matter of record in accordance with rules and regulations of the Secretary. As used in this subparagraph, the terms "liens", "encumbrances", and "adverse claims" do not refer to property reservations which land developers commonly convey or dedicate to local bodies or public utilities for the purpose of bringing public services to the land being developed, nor to taxes and assessments imposed by a State, by any other public body having authority to assess and tax property, or by a property owners' association, which, under applicable State or local law, constitute liens on the property before they are due and payable, nor to beneficial property restrictions which would be enforceable by other lot owners or lessees in the subdivision, if (A) the developer, prior to the time the contract of sale or lease is entered into, has furnished each purchaser or lessee with a statement, the form and content of which has been approved by the Secretary, setting forth in descriptive and concise terms all such reservations, taxes, assessments, and restrictions which are applicable to the lot to be purchased or leased, and (B) receipt of such statement has been acknowledged in writing by the purchaser or lessee, and a copy of the acknowledged statement is filed with the Secretary in accordance with such rules and regulations as he may require; or

(11) the sale or lease of real estate which is zoned by the appropriate governmental authority for industrial or commercial development, when—

(A) local authorities have approved access from such real estate to a public street or highway;

(B) the purchaser or lessee of such real estate is a duly organized corporation, partnership, trust, or business entity engaged in commercial or industrial business;

(C) the purchaser or lessee of such real estate is represented in the transaction of sale or lease by a representative of its own selection;

(D) the purchaser or lessee of such real estate affirms in writing to the seller that it either (i) is purchasing or leasing such real estate substantially for its own use or (ii) has a binding commitment to sell, lease, or sublease such real estate to an entity which meets the requirements of subparagraph (B), is engaged in commercial or industrial business, and is not affiliated with the seller or agent; and

(E) a policy of title insurance or title opinion is issued in connection with the transaction showing that title to the real estate purchased or leased is vested in the seller or lessor, subject only to such exceptions as may be approved in writing by such purchaser or the lessee prior to recordation of the instrument of conveyance or execution of the lease, but (i) nothing herein

shall be construed as requiring the recordation of a lease, and (ii) any purchaser or lessee may waive, in writing in a separate document, the requirement of this subparagraph that a policy of title insurance or title opinion be issued in connection with the transaction.

§ 1703. *Prohibitions relating to sale or lease of lots in subdivisions; voidability of contracts or agreements*

(a) It shall be unlawful for any developer or agent, directly or indirectly, to make use of any means or instruments of transportation or communication in interstate commerce, or of the mails—

(1) to sell or lease any lot in any subdivision unless a statement of record with respect to such lot is in effect in accordance with section 1706 of this title and a printed property report, meeting the requirements of section 1707 of this title, is furnished to the purchaser in advance of the signing of any contract or agreement for sale or lease by the purchaser; and

(2) in selling or leasing, or offering to sell or lease, any lot in a subdivision—

(A) to employ any device, scheme, or artifice to defraud, or

(B) to obtain money or property by means of a material misrepresentation with respect to any information included in the statement of record or the property report or with respect to any other information pertinent to the lot

or the subdivision and upon which the purchaser relies, or

(C) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon a purchaser.

(b) Any contract or agreement for the purchase or leasing of a lot in a subdivision covered by this chapter, where the property report has not been given to the purchaser in advance or at the time of his signing, shall be voidable at the option of the purchaser. A purchaser may revoke such contract or agreement until midnight of the third business day following the consummation of the transaction, where he has received the property report less than forty-eight hours before he signed the contract or agreement, and the contract or agreement shall so provide.

§ 1704. *Registration of subdivisions—Filing of statement of record*

(a) A subdivision may be registered by filing with the Secretary a statement of record, meeting the requirements of this chapter and such rules and regulations as may be prescribed by the Secretary in furtherance of the provisions of this chapter. A statement of record shall be deemed effective only as to the lots specified therein.

Payment of fees; use by Secretary

(b) At the time of filing a statement of record, or any amendment thereto, the developer shall pay to the Secretary a fee, not in excess of $1,000, in accord-

ance with a schedule to be fixed by the regulations of the Secretary, which fees may be used by the Secretary to cover all or part of the cost of rendering services under this chapter, and such expenses as are paid from such fees shall be considered non-administrative.

Filing deemed to have taken place upon receipt of statement of record accompanied by fee

(c) The filing with the Secretary of a statement of record, or of an amendment thereto, shall be deemed to have taken place upon the receipt thereof, accompanied by payment of the fee required by subsection (b) of this section.

Availability of information to public

(d) The information contained in or filed with any statement of record shall be made available to the public under such regulations as the Secretary may prescribe and copies thereof shall be furnished to every applicant at such reasonable charge as the Secretary may prescribe.

§ 1705. *Information required in statement of record*

The statement of record shall contain the information and be accompanied by the documents specified hereinafter in this section—

(1) the name and address of each person having an interest in the lots in the subdivision to be covered by the statement of record and the extent of such interest;

(2) a legal description of, and a statement of the total area included in, the subdivision and a

statement of the topography thereof, together with a map showing the division proposed and the dimensions of the lots to be covered by the statement of record and their relation to existing streets and roads;

(3) a statement of the condition of the title to the land comprising the subdivision, including all encumbrances and deed restrictions and covenants applicable thereto;

(4) a statement of the general terms and conditions, including the range of selling prices or rents, at which it is proposed to dispose of the lots in the subdivision;

(5) a statement of the present condition of access to the subdivision, the existence of any unusual conditions relating to noise or safety which affect the subdivision and are known to the developer, the availability of sewage disposal facilities and other public utilities (including water, electricity, gas, and telephone facilities) in the subdivision, the proximity in miles of the subdivision to nearby municipalities, and the nature of any improvements to be installed by the developer and his estimated schedule for completion;

(6) in the case of any subdivision or portion thereof against which there exists a blanket encumbrance, a statement of the consequences for an individual purchaser of a failure, by the person or persons bound, to fulfill obligations under the instrument or instruments creating such en-

cumbrance and the steps, if any, taken to protect the purchaser in such eventuality;

(7)(A) copy of its articles of incorporation, with all amendments thereto, if the developer is a corporation; (B) copies of all instruments by which the trust is created or declared, if the developer is a trust; (C) copies of its articles of partnership or association and all other papers pertaining to its organization, if the developer is a partnership, unincorporated association, joint stock company, or any other form of organization; and (D) if the purported holder of legal title is a person other than developer, copies of the above documents for such person;

(8) copies of the deed or other instrument establishing title to the subdivision in the developer or other person and copies of any instrument creating a lien or encumbrance upon the title of developer or other person or copies of the opinion or opinions of counsel in respect to the title to the subdivision in the developer or other person or copies of the title insurance policy guaranteeing such title;

(9) copies of all forms of conveyance to be used in selling or leasing lots to purchasers;

(10) copies of instruments creating easements or other restrictions;

(11) such certified and uncertified financial statements of the developer as the Secretary may require, and

(12) such other information and such other documents and certifications as the Secretary may require as being reasonably necessary or appropriate for the protection of purchasers.

§ 1706. *Effective date of statements of record and amendments thereto—Thirtieth day after filing or such earlier date as determined by Secretary; consolidation of subsequent statement with earlier recording*

(a) Except as hereinafter provided, the effective date of a statement of record, or any amendment thereto, shall be the thirtieth day after the filing thereof or such earlier date as the Secretary may determine, having due regard to the public interest and the protection of purchasers. If any amendment to any such statement is filed prior to the effective date of the statement, the statement shall be deemed to have been filed when such amendment was filed; except that such an amendment filed with the consent of the Secretary, or filed pursuant to an order of the Secretary, shall be treated as being filed as of the date of the filing of the statement of record. When a developer records additional lands to be offered for disposition, he may consolidate the subsequent statement of record with any earlier recording offering subdivided land for disposition under the same promotional plan. At the time of consolidation the developer shall include in the consolidated statement of record any material changes in the information contained in the earlier statement.

Incomplete or inaccurate statements of record

(b) If it appears to the Secretary that a statement of record, or any amendment thereto, is on its face incomplete or inaccurate in any material respect, the Secretary shall so advise the developer within a reasonable time after the filing of the statement or the amendment, but prior to the date the statement or amendment would otherwise be effective. Such notification shall serve to suspend the effective date of the statement or the amendment until thirty days after the developer files such additional information as the Secretary shall require. Any developer, upon receipt of such notice, may request a hearing, and such hearing shall be held within twenty days of receipt of such request by the Secretary.

Amendment of statement of record

(c) If, at any time subsequent to the effective date of a statement of record, a change shall occur affecting any material fact required to be contained in the statement, the developer shall promptly file an amendment thereto. Upon receipt of any such amendment, the Secretary may, if he determines such action to be necessary or appropriate in the public interest or for the protection of purchasers, suspend the statement of record until the amendment becomes effective.

Suspension of statement of record containing untrue statement or omission to state material fact; notice and hearing; termination of order of suspension

(d) If it appears to the Secretary at any time that a statement of record, which is in effect, includes any

untrue statement of a material fact or omits to state any material fact required to be stated therein or necessary to make the statement therein not misleading, the Secretary may, after notice, and after opportunity for hearing (at a time fixed by the Secretary) within fifteen days after such notice, issue an order suspending the statement of record. When such statement has been amended in accordance with such order, the Secretary shall so declare and thereupon the order shall cease to be effective.

Examination to determine issuance of order; access to records; order suspending statement of record upon failure to cooperate

(e) The Secretary is hereby empowered to make an examination in any case to determine whether an order should issue under subsection (d) of this section. In making such examination, the Secretary or anyone designated by him shall have access to and may demand the production of any books and papers of, and may administer oaths and affirmations to and examine, the developer, any agents, or any other person, in respect of any matter relevant to the examination. If the developer or any agents shall fail to cooperate, or shall obstruct or refuse to permit the making of an examination such conduct shall be proper ground for the issuance of an order suspending the statement of record.

Service of notices

(f) Any notice required under this section shall be sent or served on the developer or his authorized agent.

§ 1707. *Information required in property report; use for promotional purposes*

(a) A property report relating to the lots in a subdivision shall contain such of the information contained in the statement of record, and any amendments thereto, as the Secretary may deem necessary, but need not include the documents referred to in paragraphs (7) to (11), inclusive, of section 1705 of this title. A property report shall also contain such other information as the Secretary may by rules or regulations require as being necessary or appropriate in the public interest or for the protection of purchasers.

(b) The property report shall not be used for any promotional purposes before the statement of record becomes effective and then only if it is used in its entirety. No person may advertise or represent that the Secretary approves or recommends the subdivision or the sale or lease of lots therein. No portion of the property report shall be underscored, italicized, or printed in larger or bolder type than the balance of the statement unless the Secretary requires or permits it.

§ 1708. *Cooperation with State authorities; jurisdiction of real estate commission or similar body of State*

(a) In administering this chapter, the Secretary shall cooperate with State authorities charged with the responsibility of regulating the sale of lots in subdivisions which are also subject to this chapter

and may accept for filing under section 1704 of this title and declare effective as a statement of record, if he finds such action to be appropriate in the public interest or for the protection of purchasers, material filed with and found acceptable by such authorities.

(b) Nothing in this chapter shall affect the jurisdiction of the real estate commission (or any agency or office performing like functions) of any State over any subdivision or any person.

§ 1709. *Civil liabilities—Suit for untrue statement or omission to state material fact in statement of record*

(a) Where any part of the statement of record, when such part became effective, contained an untrue statement or a material fact or omitted to state a material fact required to be stated therein, any person acquiring a lot in the subdivision covered by such statement of record from the developer or his agent during such period the statement remained uncorrected (unless it is proved that at the time of such acquisition he knew of such untruth or omission) may, either at law or in equity, in any court of competent jurisdiction, sue the developer.

Suit for sale or lease in violation of section 1703 of this title or by means of property report containing untrue statement or omission to state material fact

(b) Any developer or agent, who sells or leases a lot in a subdivision—

(1) in violation of section 1703 of this title, or

(2) by means of a property report which contained an untrue statement of a material fact or

omitted to state a material fact required to be stated therein, may be sued by the purchaser of such lot.

Damages recoverable

(c) The suit authorized under subsection (a) or (b) of this section may be to recover such damages as shall represent the difference between the amount paid for the lot and the reasonable cost of any improvements thereto, and the lesser of (1) the value thereof as of the time such suit was brought, or (2) the price at which such lot shall have been disposed of in a bona fide market transaction before suit, or (3) the price at which such lot shall have been disposed or after suit in a bona fide market transaction but before judgment.

Contribution

(d) Every person who becomes liable to make any payment under this section may recover contribution as in cases of contract from any person who, if sued separately, would have been liable to make the same payment.

Amount recoverable

(e) In no case shall the amount recoverable under this section exceed the sum of the purchase price of the lot, the reasonable cost of improvements, and reasonable court costs.

§ 1710. *Review of orders; jurisdiction; procedure; conclusiveness of findings; additional evidence; modification of findings by Secretary; stay*

(a) Any person, aggrieved by an order or determination of the Secretary issued after a hearing, may

obtain a review of such order or determination in the court of appeals of the United States, within any circuit wherein such person resides or has his principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the entry of such order or determination, a written petition praying that the order or determination of the Secretary be modified or be set aside in whole or in part. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Secretary, and thereupon the Secretary shall file in the court the record upon which the order or determination complained of was entered, as provided in section 2112 of Title 28. No objection to an order or determination of the Secretary shall be considered by the court unless such objection shall have been urged before the Secretary. The finding of the Secretary as to the facts, if supported by substantial evidence, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the hearing before the Secretary, the court may order such additional evidence to be taken before the Secretary and to be adduced upon a hearing in such manner and upon such terms and conditions as to the court may seem proper. The Secretary may modify his findings as to the facts by reason of the additional evidence so taken, and shall file such modified or new findings, which, if supported by substantial evidence, shall be conclusive, and his recommen-

dation, if any, for the modification or setting aside of the original order. Upon the filing of such petition, the jurisdiction of the court shall be exclusive and its judgment and decree, affirming, modifying, or setting aside, in whole or in part, any order of the Secretary, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 or Title 28.

(b) The commencement of proceedings under subsection (a) of this section shall not, unless specifically ordered by the court, operate as a stay of the Secretary's order.

§ 1711. *Limitation of actions*

No action shall be maintained to enforce any liability created under section 1709(a) or (b)(2) of this title unless brought within one year after the discovery of the untrue statement or the omission, or after such discovery should have been made by the exercise of reasonable diligence, or, if the action is to enforce a liability created under section 1709(b)(1) of this title, unless brought within two years after the violation upon which it is based. In no event shall any such action be brought by a purchaser more than three years after the sale or lease to such purchaser.

§ 1712. *Contrary stipulations void*

Any condition, stipulation, or provision binding any person acquiring any lot in a subdivision to waive compliance with any provision of this chapter or of the rules and regulations of the Secretary shall be void.

§ 1713. *Additional remedies*

The rights and remedies provided by this chapter shall be in addition to any and all other rights and remedies that may exist at law or in equity.

§ 1714. *Investigations, injunctions, and prosecution of offenses—Permanent or temporary injunction or restraining order; jurisdiction*

(a) Whenever it shall appear to the Secretary that any person is engaged or about to engage in any acts or practices which constitute or will constitute a violation of the provisions of this chapter, or of any rule or regulation prescribed pursuant thereto, he may, in his discretion, bring an action in any district court of the United States, or the United States District Court for the District of Columbia to enjoin such acts or practices, and, upon a proper showing, a permanent or temporary injunction or restraining order shall be granted without bond. The Secretary may transmit such evidence as may be available concerning such acts or practices to the Attorney General who may, in his discretion, institute the appropriate criminal proceedings under this chapter.

Investigations; publication of information concerning violations

(b) The Secretary may, in his discretion, make such investigations as he deems necessary to determine whether any person has violated or is about to violate any provision of this chapter or any rule or regulation prescribed pursuant thereto, and may require or permit any person to file with him a statement in writing, under oath or otherwise as the Secretary

shall determine, as to all the facts and circumstances concerning the matter to be investigated. The Secretary is authorized, in his discretion, to publish information concerning any such violations, and to investigate any facts, conditions, practices, or matters which he may deem necessary or proper to aid in the enforcement of the provisions of this chapter, in the prescribing of rules and regulations thereunder, or in securing information to serve as a basis for recommending further legislation concerning the matters to which this chapter relates.

Oaths and affirmations; subpena power

(c) For the purpose of any such investigation, or any other proceeding under this chapter, the Secretary, or any officer designated by him, is empowered to administer oaths and affirmations, subpena witnesses, compel their attendance, take evidence, and require the production of any books, papers, correspondence, memorandums, or other records which the Secretary deems relevant or material to the inquiry. Such attendance of witnesses and the production of any such records may be required from any place in the United States or any State of any designated place of hearing.

Contempt; court order requiring attendance and testimony of witnesses; jurisdiction

(d) In case of contumacy by, or refusal to obey a subpena issued to, any person, the Secretary may invoke the aid of any court of the United States within the jurisdiction of which such investigation or proceeding is carried on, or where such person resides or

carries on business, in requiring the attendance and testimony of witnesses and the production of books, papers, correspondence, memorandums, and other records and documents. And such court may issue an order requiring such person to appear before the Secretary or any officer designated by the Secretary, there to produce records, if so ordered, or to give testimony touching the matter under investigation or in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof. All process in any such case may be served in the judicial district whereof such person is an inhabitant or wherever he may be found.

§ 1715. *Administration; delegation of functions, duties and powers; hearing officers; appeals from decisions; public hearings; record of hearings*

(a) The authority and responsibility for administering this chapter shall be in the Secretary of Housing and Urban Development who may delegate any of his functions, duties, and powers to employees of the Department of Housing and Urban Development or to boards of such employees, including functions, duties, and powers with respect to investigating, hearing, determining, ordering, or otherwise acting as to any work, business, or matter under this chapter. The persons to whom such delegations are made with respect to hearing functions, duties, and powers shall be appointed and shall serve in the Department in compliance with sections 3105, 3344, 5362, and 7521 of Title 5. The Secretary shall by rule pre-

scribe such rights of appeal from the decisions of his hearing examiners to other hearing examiners or to other officers in the Department, to boards of officers or to himself, as shall be appropriate and in accordance with law.

(b) All hearings shall be public and appropriate records thereof shall be kept, and any order issued after such hearing shall be based on the record made in such hearing which shall be conducted in accordance with the provisions of the Administrative Procedure Act.

§ 1716. *Unlawful representations*

The fact that a statement of record with respect to a subdivision has been filed or is in effect shall not be deemed a finding by the Secretary that the statement of record is true and accurate on its face, or be held to mean the Secretary has in any way passed upon the merits of, or given approval to, such subdivision. It shall be unlawful to make, or cause to be made, to any prospective purchaser any representation contrary to the foregoing.

§ 1717. *Penalties for violations*

Any person who willfully violates any of the provisions of this chapter or the rules and regulations prescribed pursuant thereto, or any person who willfully, in a statement of record filed under, or in a property report issued pursuant to, this chapter, makes any untrue statement of a material fact or omits to state any material fact required to be stated therein, shall upon

conviction be fined not more than $5,000 or imprisoned not more than five years, or both.

§ 1718. *Rules, regulations, and orders*

The Secretary shall have authority from time to time, to make, issue, amend, and rescind such rules and regulations and such orders as are necessary or appropriate to the exercise of the functions and powers conferred upon him elsewhere in this chapter. For the purpose of his rules and regulations, the Secretary may classify persons and matters within his jurisdiction and prescribe different requirements for different classes of persons or matters.

§ 1719. *Jurisdiction of offenses and suits*

The district courts of the United States, the United States courts of any territory, and the United States District Court for the District of Columbia shall have jurisdiction of offenses and violations under this chapter and under the rules and regulations prescribed by the Secretary pursuant thereto, and concurrent with State courts, of all suits in equity and actions at law brought to enforce any liability or duty created by this chapter. Any such suit or action may be brought to enforce any liability or duty created by this chapter. Any such suit or action may be brought in the district wherein the defendant is found or is an inhabitant or transacts business, or in the district where the offer or sale took place, if the defendant participated therein, and process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found. Judg-

ments and decrees so rendered shall be subject to review as provided in section 1254 and 1291 of Title 28. No case arising under this chapter and brought in any State court of competent jurisdiction shall be removed to any court of the United States, except where the United States or any officer or employee of the United States in his official capacity is a party. No costs shall be assessed for or against the Secretary in any proceeding under this chapter brought by or against him in the Supreme Court or such other courts.

§ 1720. *Authorization of appropriations*

There are authorized to be appropriated such sums as may be necessary to carry out this chapter.

Supreme Court, U. S.
FILED
SEP 30 1976
MICHAEL RODAK, JR., CLERK

No. 76-181

In the Supreme Court of the United States

OCTOBER TERM, 1976

A. E. BIDERMAN, ET AL., PETITIONERS

v.

CARLA A. HILLS, SECRETARY OF HOUSING AND URBAN DEVELOPMENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 536 F. 2d 820. The orders and opinion of the district court (Pet. App. 15a-20a) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on May 24, 1976, and a petition for rehearing with suggestion of rehearing *en banc* was denied on July 8, 1976 (Pet. App. 14a). The petition for a writ of certiorari was filed on August 9, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, in the circumstances of this case, the court of appeals erred in enforcing administrative subpoenas *duces tecum*, as modified by a protective order precluding the improper use of subpoenaed documents, without allowing pre-enforcement discovery or an evidentiary hearing on the alleged improper purpose for the subpoenas.

2. Whether the court of appeals erred in ruling on the purposes of the subpoenas in the absence of separately stated findings of fact and conclusions of law by the district court.

STATEMENT

Petitioners are land developers who were served with two administrative subpoenas *duces tecum* in the course of an investigation by the Department of Housing and Urban Development under the Interstate Land Sales Full Disclosure Act, 15 U.S.C. 1701 *et seq.* They contend that, before the subpoenas were enforced by the district court, they should have been afforded discovery and an evidentiary hearing on their claim that there was no legitimate purpose for the subpoenas.

1. The Interstate Land Sales Full Disclosure Act (the "Land Sales Act"), 82 Stat. 590, as amended by Pub. L. 93-383, 88 Stat. 736, 15 U.S.C. (and Supp. V) 1701 *et seq.*, prohibits a "developer" from selling or leasing any lot in any subdivision, by use of the mails or other instruments of interstate commerce, unless a "statement of record" is filed with the Secretary of Housing and Urban Development and a "printed property report" is furnished to prospective purchasers. 15 U.S.C. 1703(a)(1), 1704-1707. It is also unlawful for any developer to defraud or deceive a purchaser. 15 U.S.C. 1703(a)(2). If a property report is not given to a purchaser before he signs an agreement to purchase,

the agreement is voidable at the option of the purchaser. 15 U.S.C. (Supp. V) 1703(b). A purchaser may also sue for money damages if there are untrue statements of material fact or omissions in the statement of record. 15 U.S.C. 1709.

The Secretary is authorized to bring an action to enjoin acts or practices that violate the Land Sales Act. 15 U.S.C. 1714(a). The Secretary also may make such investigations as he deems necessary to determine whether any person has violated or is about to violate any provision of the Act and may "publish information concerning any such violations, and * * * investigate any facts, conditions, practices, or matters * * * to aid in the enforcement of the provisions of [the Act], in the prescribing of rules and regulations thereunder, or in securing information to serve as a basis for recommending further legislation concerning the matters to which * * * [the Act] relates." 15 U.S.C. 1714(b).

An action for damages based on an untrue statement or omission in the property report must be brought within one year after the statement is or should have been discovered, and an action for rescission based on fraud or the failure of the developer to file a report must be brought within two years of the violation. 15 U.S.C. 1711. However, "[i]n no event shall any action be brought by a purchaser more than three years after the sale or lease to such purchaser." *Ibid.*

2. The challenged subpoenas were issued to petitioners in 1973, pursuant to 15 U.S.C. 1714(c), after HUD's Office of Interstate Land Sales Registration ("OILSR") received complaints concerning petitioners' land sales

activities.[1] Although petitioners partially complied with the subpoenas, they refused to provide OILSR officials with the names and addresses of purchasers or copies of the sales contracts and deeds (Pet. App. 4a).

When petitioners continued in their refusal to comply, the Secretary in September 1974 brought this action in the United States District Court for the Northern District of California, seeking judicial enforcement of the subpoenas. Attached as an exhibit to the petition for enforcement was the affidavit of John McDowell, Deputy Administrator of OILSR, which stated that the purpose of the HUD investigation was to determine whether petitioners had violated the registration requirements or fraud provisions of the Land Sales Act. The affidavit also stated that OILSR sought the names and addresses of petitioner's customers "so that they can be contacted about the specifics of the sales operations of the corporations," and that, if the OILSR investigation uncovered violations of the Land Sales Act, "the Secretary has the authority to bring an injunctive action or seek criminal sanctions pursuant to 15 U.S.C. §1714(a) and 1717" (Pet. App. 4a).

Petitioners opposed enforcement of the subpoenas and filed a counterclaim for declaratory and injunctive relief. They contended that HUD and OILSR wanted the customer lists only in order to notify customers that petitioners had failed to register with the agency, so that

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[1]There were two subpoenas. On January 22, 1973, OILSR issued a subpoena requiring petitioner A. E. Biderman to appear to testify and to produce certain documents pertaining to the sales activities of petitioners Priority Investments, Inc. (Washington), Peerless Research, Inc., and Capital Land Investments, Inc. On July 12, 1973, OILSR issued a second subpoena requiring petitioner Richard Yagle to appear to testify and to produce certain documents pertaining to the sales activities of petitioner Priority Investments, Inc. (California) (Pet. App. 3a-4a).

those customers could rescind their contracts and sue for damages (15 U.S.C. (Supp. V) 1703(b), 1709), and that those purposes were illegitimate because the limitations periods for such actions had run.[2] Petitioners also argued that the only civil remedy available to the Secretary, an injuction against sales violating the Land Sales Act (see 15 U.S.C. 1714(a)), was not available because petitioners had voluntarily ceased selling land (Pet. App. 6a-7a).

3. The district court summarily enforced the subpoenas (Pet. App. 19a-20a) and dismissed petitioners' counterclaim (Pet. App. 15a-18a), finding that the provisions of 15 U.S.C. 1714(b) concerning publication of information authorized the Secretary to inform customers about petitioner's possible violations of the Land Sales Act. Petitioners' request for an evidentiary hearing or pre-enforcement discovery also was denied.

The court of appeals affirmed the enforcement of the subpoenas,[3] with the addition of a limited protective order precluding OILSR officials from "advising [petitioners'] customers that they have a right to rescind

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[2]Petitioners submitted affidavits stating that the last sale of real property by petitioner Peerless Research was on or about January 19, 1973, the last sale by petitioner Priority Investment (California) was on or about April 13, 1971, and the last sale by petitioner Priority Investments (Washington) was on or about June 29, 1971. This information indicated that the limitations period in 15 U.S.C. 1711 had expired and that the customers could no longer rescind their contracts or recover damages. See *Jacobsen* v. *Woodmoor Corp.*, 400 F. Supp. 1 (W.D. Mo.); *Hall* v. *Bryce's Mountain Resort, Inc.*, 379 F. Supp. 165 (W.D. Va.); *Melhorn* v. *Amrep Corp.*, 373 F. Supp. 1378 (M.D. Pa.).

[3]The court of appeals' disposition, enforcing the subpoenas as modified by the protective order, necessarily affirmed the dismissal of petitioners' counterclaims seeking declaratory and injunctive relief against the subpoenas.

their contracts and recover back any money paid thereunder" (Pet. App. 13a).[4] Viewing the case under the well-settled standards of *United States* v. *Powell*, 379 U.S. 48, 57-58, the court found that the record disclosed two legitimate purposes for the subpoenas. First, the court ruled that the "names of past customers are relevant to an investigation which has an objective of obtaining injunctive relief because it is important to ascertain how [petitioners] secure sales leads and what sales techniques are employed" (Pet. App. 8a). Petitioners' claim of mootness was rejected as a defense to an injunctive suit under 15 U.S.C. 1714(a), since to establish mootness petitioners would have to demonstrate at trial "that there is no reasonable expectation that the wrong will be repeated." *Ibid.* Second, the court found that petitioners' customer lists "are relevant to the legitimate purpose of accumulating information so that the Secretary can recommend future legislation," as authorized by 15 U.S.C. 1714(b). *Ibid.*

The court of appeals also upheld the district court's refusal to accord petitioners an evidentiary hearing or pre-enforcement discovery. Relying on its decision in *United States* v. *Church of Scientology of California*, 520 F. 2d 818 (C.A. 9), the court concluded that, in the circumstances of this case, "[t]here is no indication whatsoever that anything would have been accomplished by an evidentiary hearing" (Pet. App. 12a). Since the investigation had been initiated at the request

[4]The court issued the protective order because the record disclosed that OILSR officials may have had, in addition to several legitimate purposes, the improper intention to write to petitioners' customers to inform them that they could void their contracts and receive cash refunds—advice that the court found "was quite probably erroneous and was not authorized by the law" since the statute of limitations had run on these purchaser rights in this case. (Pet. App. 12a).

of aggrieved outside parties rather than by the agency itself, there was little chance of a bad faith investigation (Pet. App. 11a). But more importantly, the court found that the affidavits before the trial court clearly established that there were one or more legitimate purposes for the administrative subpoena, and that it is not "a ground to deny enforcement of a subpoena that it is being employed for a wrongful purpose if there is also a legitimate purpose for the subpoena. *Donaldson* v. *United States*, 400 U.S. 517 (1971); *Weld* [*sic*] v. *United States*, 362 F. 2d 206 (9th Cir. 1966)" (Pet. App. 12a).

ARGUMENT

The court of appeals' decision is correct and involves only the application of settled legal principles to the particular factual setting of this case. Moreover, the protective order imposed by the court of appeals expressly limits the use of the subpoenaed documents and eliminates any basis for petitioners' concern that OILSR officials might use the customer lists for an improper purpose.

1. Petitioners claim (Pet. 18-21) that the court of appeals approved a "unique" procedure that deprived them of an opportunity to show that the sole reason for the OILSR subpoenas was illegitimate. They also contend that the enforcement procedures sanctioned by the courts below are at odds with the procedures outlined in *United States* v. *McCarthy*, 514 F. 2d 368 (C.A. 3), and *United States* v. *Church of Scientology of California, supra*, as well as other cases involving Internal Revenue Service summonses.

These contentions are incorrect. In denying pre-enforcement discovery, the court of appeals followed the general rule that, "[i]n contrast to the procedure in

ordinary civil cases, discovery in a summary summons enforcement proceeding is the exception rather than the rule." *United States* v. *Church of Scientology of California, supra,* 520 F. 2d at 824.[5] Moreover, "not every summons enforcement proceeding will require an evidentiary hearing" (*United States* v. *McCarthy, supra,* 514 F. 2d at 373), and the court correctly determined that no purpose would have been served by a hearing or discovery here. See *Federal Trade Commission* v. *Browning,* 435 F. 2d 96, 104 (C.A. D.C.). The affidavits before the trial court conclusively established that there were one or more legitimate purposes for the OILSR subpoenas, including the acquisition of information by the Secretary for a possible injunctive suit under 15 U.S.C. 1714(a). Although there may also have been an improper purpose underlying the OILSR subpoenas, as petitioners claim and the court of appeals believed, that would not have justified a denial of enforcement even if proven in the district court (*Donaldson* v. *United States,* 400 U.S. 517, 532-533), and the protective order provides concrete assurance that the subpoenas will not be used for that purpose.

2. Equally unpersuasive is petitioners' claim (Pet. 22) that the court of appeals could not properly rule on the purposes behind the OILSR subpoenas in the absence of express findings of fact and conclusions of law by the district court. Subpoena enforcement proceedings are summary in nature (see *United States* v. *Church of Scientology of California, supra,* 520 F. 2d

[5]None of the cases cited by petitioners (Pet. 18-21) endorses a rigid rule requiring discovery and an evidentiary hearing in every subpoena enforcement proceeding. Whether an evidentiary proceeding is necessary prior to summary enforcement must be judged on the facts of each case. Thus, contrary to petitioner's assertions, there is no conflict among the circuits on this issue.

at 824), and the record before the court of appeals adequately set forth the essential facts, including the reasons for issuance of the subpoenas.[6] Indeed, the court was able to conclude, on the basis of the record, that petitioners' objections were valid, and it therefore entered a protective order. The affidavits of OILSR officials, however, also established the existence of independent, legitimate purposes for the subpoenas, which justified their enforcement. See *Pacific Westbound Conference* v. *United States,* 332 F. 2d 49, 53-55 (C.A. 9).[7]

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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[6]Contrary to petitioners' contentions (Pet. 22), the district court met the requirements of Fed. R. Civ. P. 52(a) when it set forth its findings and conclusions in the Order Dismissing Counterclaim (Pet. App. 15a-17a). See *Trentman* v. *City and County of Denver, Colo.,* 236 F. 2d 951 (C.A. 10), certiorari denied, 352 U.S. 943; *Elam* v. *United States,* 250 F. 2d 582 (C.A. 6), certiorari denied, 358 U.S. 848; 5A Moore's *Federal Practice* para. 52.01[1], [5] (1975).

[7]In light of the court of appeals' enforcement of the subpoenas, as modified, for reasons stated in a detailed opinion, petitioners' claim (Pet. 18, 22) that the court failed to adjudicate the appeal from the dismissal of their counterclaim is insubstantial. See n. 3, *supra.*